IN THE

Supreme Court of the United States

October Term, 1960

No. 34

TIMES FILM CORPORATION,

Petitioner,

vs.

CITY OF CHICAGO,
RICHARD J. DALEY,
TIMOTHY J. O'CONNOR,

Respondents.

On Petition for Rehearing

BRIEF AS *AMICI CURIAE* FOR THE AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS AND THE SOCIETY OF MAGAZINE WRITERS

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Prior Proceedings

The opinion of the Supreme Court of the United States was rendered on January 23, 1961 and is reported in 29 U. S. L. Week 4120 (Jan. 24, 1961).

Interest of the *Amici Curiae*

We have in the accompanying notice of motion set forth the pertinent facts concerning the American Society of Magazine Photographers and the Society of Magazine Writers and the reasons why we believe acceptance by this Court of this brief submitted on behalf of these organizations as *amici curiae* is appropriate to the consideration of the petition for reargument. We believe that none of the litigants here will cover the question discussed herein.

Summary of Argument

The opinions of this Court do not cover the question which *amici* believe to be at the core of this case, namely, whether the ordinance in question represents an unreasonable classification of motion pictures and thus denies petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment. *Amici* suggest that although adequately preserved for jurisdictional purposes the equal protection point was not decided by this Court because the peculiar procedural posture of the case, in which neither of the courts below reached the merits and no evidence was taken, precluded a development of the facts.

The single argument made in this brief is that the failure of the litigants to deal adequately with the crucial problem of equal protection stems not from any obvious distinctions between moving pictures and other communications media but from the curious constitutional legal history of motion pictures and its late arrival as a means for the dissemination of ideas.

Whether or not the ordinance in question is a denial of equal protection rests on facts which can be best adduced in the District Court.

ARGUMENT

The Court's decision is not dispositive of the equal protection question which appears on the face of the Chicago ordinance.

We address the Court on a single constitutional issue adequately protected for jurisdictional purposes but, as we read the proceedings, only tangentially touched upon in the pleadings, briefs or in the opinions of the Court. We refer to the isolated constitutional problem that goes to the equal protection provision of the Fourteenth Amendment.

For the purposes of our plea we need not burden the Court with a single extra word dealing with the concepts of censorship pre or post, nor does the question we raise deal with any appraisal of the nature or quality of the material that goes to the mind of man. We are concerned with the discrimination levelled against a single avenue of approach to the market place of thought—motion pictures into theaters. Even the phrase "movie censorship" begs the question.

Ideas are placed on film by separate pictures or "frames" and shown at such a speed as to be received by man as if the speech or behavior had continuity. This access to the market place of thought is recent in terms of the existence of our Constitution and is in competition with many other media in the effort to influence the mind or glands of man. We have no concern at this moment with placing any value judgment as to the type of persuasion, whether good or bad or whether fitting for saints or sinners.

In brief, we view this precious market place in its isolated constitutionally protected ambit. By the conclusions reached in the *Times Film Corporation* case, ideas on celluloid to be presented in theaters by separate operators in each theater are subject to burdens of pre-treatment and pre-controls by the sovereign—in this case a city. But the identical ideas on identical types of film or equivalent tape may now in fact flow free of any pre-control or restraint if transmitted into a saloon, a home or a church. In fact, the present state of the law declares for unequal treatment between: (a) pre-censorship in Chicago of a piece of film shown to the public from a single machine run in a theater by an operator and (b) the identical piece of film shown in the same theater to the same audience free of pre-control, if and only if the mechanical process of diffusion is over the ether (*Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (3d Cir. 1950), *cert. denied*, 340 U. S. 929 (1951). Surely this obvious discrimination casts grave doubt upon the constitutionality of the Chicago ordinance.

In addition, under the present system of the transmission by television of motion pictures previously exhibited in theaters, a motion picture which may be denied clearance by the Chicago licensing law may nevertheless be shown to people of all ages in all homes throughout the Chicago area by means of television. Moreover, with regard to certain special films, there exists the practice of exhibiting these fims on television prior to exhibition in motion picture theaters. This was the case, for example, with the film "Richard III" produced and directed by Sir Laurence Olivier. It is submitted that deep thought by even the most imaginative among us would fail to disclose what possible beneficial effect the application of the

Chicago licensing law would have had upon the citizens of the City of Chicago in relation to the exhibition of "Richard III" in theaters since it had already been shown to millions in Chicago and elsewhere on non-precensored television. Nor need one be a prophet to state with some assurance that the growing use of so-called subscription or pay television will increase drastically the number of films which are shown on television prior to exhibition in motion picture theaters.

Amici are aware that *Dumont Laboratories* v. *Carroll*, *supra*, held that television, being subject to regulation only by the federal government, cannot constitutionally be subjected to state or municipal regulation, licensing or restraint. However, the obviously inseparable substantive characteristics of exhibiting motion pictures on television on the one hand and in theaters on the other, in the same locale, must cast some doubt against a prior restraint on the latter for stated purposes which often are made meaningless by the all-pervading influence of the former.

Furthermore, "frames" which were an integral part of a movie until censored are permitted free entrance into the market and hence into the minds of our people provided only that they are printed into newspapers or even in collections in book form. Without prior restraint books have been printed containing the precise picture "frames" deleted by city or state censors from motion pictures. (See Ernst and Lorentz, CENSORED—THE PRIVATE LIFE OF THE MOVIE (1930).)

There is no need here for any detailed survey of the process by which the First Amendment was assimilated into the Fourteenth and then how motion pictures were brought within the Fourteenth. This Court has had occa-

sion to cover this ground. *Joseph Burstyn Inc.* v. *Wilson*, 345 U. S. 495 (1952).

However, some historical perspective on the development of idea-disseminating media and their claim of constitutional protection may be helpful.

In 1787, at the time of the constitutional convention, there were 100 weekly gazettes with 1,000 average circulation, the largest library was 4,000 volumes, books were mainly imported from England, paintings were produced without any process of duplication and word of mouth diffusion of knowledge was carried on by travelers, soap box orators, preachers and town criers. Looking at this relative paucity of media for the dissemination of ideas it is no wonder that the debates at the constitutional convention made no reference to the market place of thought, the theory being that the States would exercise their own separate blue pencils under the concept of Federalism and that local means, where necessary, would be sufficient to cope with the limited methods of dissemination which then existed. The First Amendment was adopted not so much to cope with a major problem which then existed but rather to allay fears against action by a national government, new and untried. Since these early years, however, communications media have proliferated far beyond the imagination of the eighteenth century:

1830—The first penny daily newspaper "The Cent" was published in Philadelphia.

1844—Matthew Brady opened "Brady's Daguerrian Miniature Gallery" in New York City.

1895—The first American public exhibition of "moving pictures"—an amalgam of stills.

1905—Newsreels entered the market place in the form of a prize-fight between "Young Griffo" and "Battling Barnett."

1920—First U. S. commercial daily radio station—WWJ in Detroit.

1926—A facsimile picture (a drawing by Augustus John) first transmitted across the Atlantic.

1938—The first television theatre opened in Boston—admission fee 25¢.

1938—The first radio facsimile newspaper was issued at St. Paul, Minnesota.

1961—Subscription or "pay" television is being readied for general use.

Against these expanding and varied means of getting to the market place motion pictures have, it seems, been the unfortunate but by no means justified victims of a chronological quirk in the development of constitutionally protected areas of free speech and press.

In *Mutual Film Corp.* v. *Ohio,* 236 U. S. 230 (1915), movies shown in theaters were analogized, in effect, to the entertainment of the theater—the British Master of the Revels, the traveling vagabonds, and to forces which in England and to a lesser extent in our culture had historically seemed to warrant control by the sovereign. As a result of this analogy motion pictures were denied the protection of free speech and press granted to other forms of communication. Because of this denial, movies were prevented from enjoying the additional protection granted

by this Court to other communications media in 1925 in *Gitlow* v. *New York*, 268 U. S. 652, which held that the First Amendment guarantees of free speech and press were applicable to the States via the Fourteenth Amendment. Thus, even at this early stage movies were suffering from unequal treatment in the development of our constitutional law and were put at a disadvantage as compared with other forms of communication without factual justification.

It is well to note that the Chicago ordinance challenged in the *Times Film Corporation* case was passed in 1907 at a time when motion pictures were considered beneath the dignity of constitutional protection of any kind, whether federal or state. It was not until 1948 that movies began to be considered as a part of the free speech and press protected by the Constitution. This view, first expressed in *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1938), was reinforced in 1952 in the *Burstyn* case, *supra*. However, neither of these decisions went far enough to overcome the constitutional disability to which motion pictures had been subjected. Man has a clear proclivity to fear the novel, and possibly movies-into-theaters were singled out for the unequal treatment of pre-control because they did not carry either the sacred liberty of the age-long struggle of freedom of ideas in print or the structural benefit of the immunity from control by other than federal power, as in the case of more recently developed radio and television. See *Dumont Laboratories* v. *Carroll, supra;* cf. *Farmers Union* v. *WDAY*, 360 U. S. 525 (1959). Perhaps motion pictures were born at the wrong moment in history. At any rate it is clear that they suffered unequal treatment because of the historical accident of having achieved consti-

tutional recognition only after the *Gitlow* doctrine spread the benevolence of the First Amendment into the crannies of every state and city. It is this inequality of treatment, never really overcome, which has forced motion pictures continually to fight an uphill battle in order to assume their undoubtedly proper place as an equal among communications media, burdened with equal responsibilities and enjoying equal protection with the other members of this field.

In historical perspective the Chicago ordinance, passed in 1907, looms as a Victorian anachronism which has survived through historical accident. We submit that this Court should reconsider this case and release motion pictures from this grip of the past.

We do not claim that this market place as distinguished from that of ships, kings or sealing wax is always constitutionally free from valid controls for later restraint. Wisdom must always be able to readjust possible discriminations and unequal treatment. Man often draws a line, as does constitutional law, a little to the right or a little to the left. However, inequalities to be constitutional must be based on reasonable and rational evidence, especially when, as here, they deal with speech protected by the First Amendment. As was said by Mr. Justice Clark writing for the majority of this Court in *Joseph Burstyn Inc.* v. *Wilson*, *supra*, 502, 503:

> "It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection * * *. Nor does it follow that motion pictures are necessarily subject to the precise

> rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule * * *."

As the words of Mr. Justice Clark indicate, nothing is more cruel than unjustified egalitarianism. Nothing is more insulting to the Fourteenth Amendment than inequality of treatment unjustified by reason.

As far as we can find there is no evidence whatsoever in this record to justify unequal treatment for movies in theaters compared to movies over television into homes, movies by television in hotel dining rooms, picture books of censored movie scenes, pictures in tabloid newspapers or magazines, etc. Further, the inequalities created by the ordinance in question are even more difficult to justify since on its face the ordinance applies to newsreels and documentary films as well as fiction. We suggest that there is a constitutional point as yet not adequately presented to the minds of the judges of this Court, to wit: the inequality of treatment of this one pipeline to the mind of man and the rationale, if any, for the burden it creates. Nothing in the record, briefs or opinions suggests that this Court has taken judicial notice of any facts validating the separate and unequal treatment accorded to movies in theaters by the Chicago ordinance. We suggest that it might be of some advantage to the Court if this case were remanded for evidence as to the reasonableness of the burdens placed on this, and only this, method of access to the market place of ideas.

Until a full disclosure of the factual basis behind the discrimination in this case has been presented it is impossible for those working in communications media similar to motion pictures, such as the members represented by *amici* herein, to determine accurately whether or not their creative work-product falls within a permissible area of discriminatory legislation. As must be clear to this Court, the failure factually to distinguish motion pictures from other media has already caused great uncertainty as to the scope of the decision of this Court in the instant case.

We need not burden this document to prove that education can be entertainment and entertainment can be educational and that each and every media in competition in this market place is capable of both. We suggest that where the market place of thought is concerned, there should be some attempt to produce rational and reasonable evidence relative to the peculiar danger which would warrant the City of Chicago under our Constitution to place special prior restraints upon motion pictures as compared, for example, to the 5 cent tabloid, with all its pictures of sex and crime, but brought into the home to be viewed as reality and not in terms of escapist material. By all recent studies, such "reality" has a more acute impact on the minds of adults and youths than do fictional movies. (See, for example, Bender, A DYNAMIC PSYCHOPATHOLOGY OF CHILDHOOD (1954) and Jahoda, THE IMPACT OF LITERATURE (1954).)

We suggest on the basis of the state of the record herein that the proper disposition of this case is to remand it to the District Court for a trial on the merits with respect to the question of unequal treatment. The peculiar pos-

ture of this case, in which a possible factual basis for the discrimination of the Chicago ordinance against motion pictures was not considered by the courts below because they found no justiciable issue, has served to obscure and confuse the equal protection point. Consequently the record indicates only a most casual treatment of this single most important aspect of the case and discloses no evidence upon which a reasoned decision can be based.

Because of the close similarities between motion pictures and other forms of communications and the confusion caused by this decision regarding its application to communications media similar to but not identical with motion pictures, *amici* strongly urge this Court to grant the petition for rehearing and remand this case to the District Court for a full canvass of the factual basis for the classification made by the Chicago ordinance. (See *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209-11 (1934) and *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, 154 (1938).) Only then will this Court have before it sufficient facts upon which to decide whether the Chicago ordinance is a denial of equal protection and to clarify the scope of its decision with regard to other communications media. We submit that since this Court has now determined that a justiciable issue does exist a remand to the District Court would be both proper and desirable.

Conclusion

The petition for rehearing should be granted and the case remanded to the District Court for the sole purpose above indicated.

Respectfully submitted,

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